REMARKS

Claims 1-21 were pending. The Examiner rejected claims 1-21 under 35 U.S.C §§ 112, second paragraph, 102(b), and 103(a). Applicant has herein amended claims 1, 7-9, 12, and 17; cancelled claims 2-6, 10, 13-14, and 18; and added claim 29. The claims as filed and the specification support the amended and new claims. For example, the amendment to claim 1 finds support in original claims 2-5 and 14 and in Example 1, pages 12-15. New claim 29 finds support in Example 1, pages 12-15. Thus, no new matter has been added. Accordingly, claims 1, 7-9, 11-12, 15-17, 19-21, and 29 are pending. In light of these amendments and the following remarks, Applicant respectfully requests reconsideration and allowance of claims 1, 7-9, 11-12, 15-17, 19-21, and 29.

Rejections under 35 U.S.C. § 112, second paragraph

The Examiner rejected claims 5, 6-10, 12, and 13 under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Applicant has herein cancelled claims 5-6, 10, and 13, thereby rendering the rejections of those claims moot. With respect to claims 9 and 12, Applicant has amended the claims to recite percentages by weight of the enzyme or ginger component. With respect to claims 7 and 8, Applicant has amended the claim per the Examiner's suggestion to recite that the ginger component "is" either ginger oil, gingerroot, or gingerroot extract.

Given the above, Applicant respectfully requests withdrawal of the rejections of claims 7-9 and 12 under 35 U.S.C. § 112, second paragraph.

Rejections under 35 U.S.C. § 102(b)

The Examiner rejected claims 1-6, 11, 14, and 19-21 under 35 U.S.C. 102(b) as being anticipated by Gooberman (<http://www.thehealthstore.net/en-us/p_2.html> (3/24/03) "Ultimate Joint Repair Formula," hereinafter Reference U). Reference U discloses a capsule having 375 mg of glucosamine sulfate and 105 mg of a "proprietary blend" of bromelain, boswellia serrata

extract (40%), tumeric, and ginger. The Examiner also rejected claims 1-4, 7, 9, 11, 12, 14, and 19-21 under 35 U.S.C. § 102(b) as being anticipated by Craig Kisciras (<http://www.rxvitamins.com/pets/nutriflex.asp (3/24/03) "Professional Veterinary Formulas: Nutriflex for Dogs and Cats," hereinafter Reference V). Reference V discloses a chewtab having 83.33 mg of glucosamine sulfate, 25 mg of ginger, and 25 mg of Bromelain. Under the standards of 35 U.S.C. § 102(b), however, Applicant respectfully asserts that References U and V are not "printed publications" available more than 1 year prior to the filing date of the present patent application. The only date on References U and V is "3/24/03," presumably the date on which the Examiner viewed and printed the web pages. March 24, 2003 is not more than 1 year prior to the date of the filing of the present application (January 4, 2002). Applicant refers the Examiner to MPEP § 2128, which states that prior art disclosures on the Internet are considered to be publicly available as of the date the item was publicly posted. MPEP § 2128 goes on to note that if the publication does not include a publication date (or retrieval date), it cannot be relied upon as prior art under 35 U.S.C. § 102(b). As the only date on References U and V is the retrieval date (March 24, 2003), which is not more than 1 year prior to the filing date of the present application, References U and V are not proper "printed publications" references under 35 U.S.C. § 102(b). See also Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560 (Fed. Cir. 1988) (holding that "[t]he statutory phrase 'printed publication' has been interpreted to mean that before the critical date the reference must have been sufficiently accessible to the public interested in the art; dissemination and public accessibility are the keys to the legal determination whether a prior art reference was 'published'.")

Applicant notes that the Examiner conducted, *sua sponte*, interviews with the following two manufacturers of nutritional supplements:

(1) Dr. Gooberman on March 25, 2003, with regard to Reference U (the "Gooberman interview" hereinafter); and

(2) Dr. Craig Kisciras of RxVitamins™ on March 26, 2003 with regard to Reference V (the "Kisciras interview" hereinafter).

With respect to the Gooberman interview, the Examiner stated in the Interview Summary (PTO-413) and Office Action that Gooberman stated that the "Ultimate Joint Repair Formula" had been "publicly available for sale for over 4 to 5 years." With respect to the Kisciras interview, the Examiner stated in the Interview Summary and Office Action that Kisciras stated that the "product has been publicly available and sold since 1997." As neither Reference U nor Reference V on its face indicates that the "Ultimate Joint Repair Formula" or "Nutriflex," respectively, had been available and sold for more than 1 year prior to the filing of the present application,[1] Applicant assumes that the Examiner is relying on the Gooberman and Kisciras interviews to allow References U and V to meet the "on-sale bar" or "public use" requirements of 35 U.S.C. § 102(b). Applicant respectfully asserts, however, that the Gooberman and Kisciras interviews are both insufficient to meet the on-sale bar or public use requirements of 35 U.S.C. § 102(b).

Existence of a public use or on-sale bar is determined by reference to the *claimed* invention. Orthokinetics, Inc. v. Safety Travel Chairs, Inc., 806 F.2d 1565 (Fed. Cir. 1986) (emphasis in the original). MPEP § 706.02(c) states that "an applicant may make an admission, or submit evidence of sale of the invention or knowledge of the invention by others, or the examiner may have personal knowledge that the invention was sold by applicant or known by others in this country." (emphasis added). Applicant has at no point made any admission regarding sale or knowledge of the invention by others. In addition, at no point did the Examiner state that she had "personal knowledge" that the claimed invention was sold or known by others. The uncorroborated Gooberman and Kisciras interviews do not constitute "personal knowledge" of the Examiner regarding prior sale or use of the claimed invention. Moreover, Gooberman's and Kisciras' uncorroborated statements do not establish that "the *claimed* invention" was on-sale for more than 1 year prior to the filing date. Gooberman and Kisceras merely stated that their "products" had been available for sale for over 4 to 5 years[2] or since 1997,[3] respectively. Neither interviewee stated that his respective product had the same formulation as that disclosed

[1] At no point do the cited web pages indicate a date of offering for sale of the "Ultimate Joint Repair Formula" or for "Nutriflex." The only date on both web pages supplied with the Office Action is "3/24/03."
[2] See Gooberman Interview Summary.
[3] See Kisciras Interview Summary.

in Reference U or Reference V during that earlier time period. Neither interviewee provided any nexus between the formulation sold at any earlier time point and that disclosed as of March 24, 2003. Indeed, neither the Examiner nor the interviewees provided any evidence of the exact formulation of the "Ultimate Joint Repair Formula" or "Nutriflex" as of more than 1 year prior to filing of the present application. Accordingly, Applicant respectfully asserts that the Gooberman and Kisciras interviews are insufficient to meet the on-sale bar or public use bar requirements of 35 U.S.C. § 102(b).

Even if Reference U and Reference V were proper § 102(b) references, neither Reference U nor Reference V discloses the presently claimed invention. A claim is anticipated under § 102(b) only if each and every limitation is disclosed in a single prior art reference. Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 639 (Fed. Cir. 1989) and MPEP § 2131. Present claim 1, from which all of the remaining claims depend directly or indirectly, recites a dietary supplement in the form of a tablet containing an aminosaccharide, a ginger component, and an enzyme, where the aminosaccharide is granulated glucosamine or a granulated glucosamine salt selected from the group consisting of glucosamine hydrochloride, glucosamine sulfate, glucosamine phosphate, glucosamine lactate, and glucosamine dodecanoate, and where about 40% to about 55% of the tablet by weight is the aminosaccharide. Neither Reference U nor Reference V teaches or suggests such a dietary supplement tablet. Reference U discloses a capsule having 375 mg of glucosamine sulfate and 105 mg of a "proprietary blend" of bromelain, boswellia serrata extract (40%), tumeric, and ginger. Reference V discloses a chewtab having 83.33 mg of glucosamine sulfate, 25 mg of ginger, and 25 mg of Bromelain. At no point do these references disclose a tablet containing about 40% to about 55% of a granulated glucosamine or granulated glucosamine salt.

Given the deficiencies of References U and V (and the corresponding Gooberman and Kisciras interviews) as indicated above, it is clear that neither reference anticipates the presently amended claims. Accordingly, Applicant respectfully requests reconsideration and withdrawal of the rejections under 35 U.S.C. § 102(b).

Rejections under 35 U.S.C. § 103(a)

The Examiner rejected claims 1, 8, 10, 11, 15, and 16-21 under 35 U.S.C. § 103(a) as being unpatentable over Gooberman (Reference U) and Kisciras (Reference V) in view of one or more of the following: Rose *et al.* (Reference A); Balch *et al.* (Reference AT); American Biologics (Reference W); Marlyn Nutraceuticals (Reference X and U1); Wood *et al.* (Reference V1); Haqqi *et al.* (Reference W1), and Bailey *et al.* (Reference B). As noted above, however, neither Reference U nor Reference V is a proper § 102(b) reference, and therefore they may not be used to establish a *prima facie* case of obviousness under 35 U.S.C. § 103(a). Accordingly, Applicant respectfully asserts that the Examiner has not established a *prima facie* case of obviousness under 35 U.S.C. § 103(a) and requests the withdrawal of the rejections under 35 U.S.C. § 103(a).

Even if Reference U and V were proper references, however, the combination of cited references fail to teach or suggest the presently claimed dietary supplement tablets. Proper analysis under § 103 requires consideration of two factors: (1) whether the prior art would have suggested to those of ordinary skill in the art that they should make the claimed composition, and (2) whether the prior art would also have revealed that in so making, those of ordinary skill would have had a reasonable expectation of success. In re Vaeck, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991). None of the cited references, either alone or in combination, teach or suggest a tablet having a ginger component, an enzyme component, and about 40% to about 55% by weight of a granulated glucosamine or granulated glucosamine salt. Reference U discloses a capsule having 375 mg of glucosamine sulfate and 105 mg of a "proprietary blend" of bromelain, boswellia serrata extract (40%), tumeric, and ginger. Reference V discloses a chewtab having 83.33 mg of glucosamine sulfate, 25 mg of ginger, and 25 mg of Bromelain. Reference A discloses a dietary supplement comprising 50 mg to 200 mg of an aminosaccharide per 25 pounds of body weight and ginger or gingerroot in an amount of 50 mg to about 220 mg per 25 pounds of body weight. References AT, W, X, U1, and V1 teach the use of multiple enzymes and enzyme amounts in dietary supplements. References W1 and B teach the inclusion of green tea extracts in nutraceuticals. None of the cited references, however, teaches or suggests a tablet

having an enzyme component, a ginger component, and about 40% to about 55% by weight of a granulated glucosamine or granulated glucosamine salt, as is required by the presently amended claims. At no point does the combination of the cited references suggest that a person having ordinary skill in the art should make or use a tablet having about 40% to about 55% by weight of a granulated glucosamine or granulated glucosamine salt, a ginger component, and an enzyme component. Accordingly, the claims are not obvious. Applicant respectfully requests withdrawal of the rejections under 35 U.S.C. § 103(a).

Request for PTO Form 892

As the Examiner apparently relied on the Gooberman and Kisciras interviews in her assessment of patentability of the pending claims, Applicant hereby requests an initialed copy of a PTO Form 892 citing the Gooberman interview "PTO Form 413 Interview Summary" and the Kisciras interview "PTO Form 413 Interview Summary."

Applicant also respectfully points out that MPEP § 713 states that the "personal appearance of an applicant, attorney, or agent before the examiner or a telephone conversation or video conference or electronic mail between such parties presenting matters for the examiner's consideration is considered an interview." (emphasis added) Applicant notes that neither Dr. Gooberman nor Mr. Kisciras is "an applicant, attorney, or agent" with respect to the pending application.

CONCLUSION

Given all of the above, Applicant respectfully requests reconsideration and allowance of claims 1, 7-9, 11-12, 15-17, 19-21, and 29. The Examiner is invited to call the under-signed attorney if such would expedite prosection. Enclosed is a $930.00 check for the Petition for Extension of Time fee. Please apply any other charges or credits to deposit account 06-1050.

Respectfully submitted,

Date: 9/3/2003

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